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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP., *Petitioners,*

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Does the 1922 Supreme Court decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, today preclude shippers from recovery of damages under the antitrust laws for the conspiratorial acts of a rate bureau and member carriers who knowingly violate the Interstate Commerce Act, related ICC regulations, and their rate bureau agreement?

PARTIES TO THE PROCEEDING

Petitioners Square D Company and Big D Building Supply Corp. are two corporations which shipped commodities between the Province of Ontario, Canada, and the Eastern United States via motor freight carriers belonging to the Niagara Frontier Tariff Bureau. They have brought suit in their individual capacity and on behalf of a class of shippers whose goods were transported by the five defendant motor carrier members of the Niagara Frontier Tariff Bureau. In conformance with Supreme Court Rule 28.1, Square D Company lists the following subsidiaries (except wholly owned subsidiaries) and affiliates: Furukawa Circuit Foil Co., Ltd., Square D (Saudi Arabia), Ltd., Square D (S.A.) and Palatine Hills Leasing, Inc.

The defendants in this action are the Niagara Frontier Tariff Bureau ("NFTB"), a motor carrier rate bureau registered with the Interstate Commerce Commission, and five motor carrier members of the Bureau which are engaged in the transportation of motor carrier freight between Canada and the United States. These carriers are Bondy Cartage Limited; Dominion-Consolidated Truck Lines, Limited; ICL International Carriers Limited; Inter-City Truck Lines (Canada), Inc.; and TNT Canada, Inc.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued its Opinion, reproduced in the Appendix to the Petition for Certiorari at pp. 1a-40a, on April 9, 1985. 760 F.2d 1347 (2d Cir. 1985). The Order of the Court of Appeals remanding these actions to the District Court in conformance with the Court's Opinion of April 9, 1985 is reproduced in the Appendix to the Petition at pp. 41a-42a. The Opinion of the District Court which ordered dismissal of these actions and which gave rise to the appeal is reproduced in the Appendix to the Petition at pp. 44a-50a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 9, 1985. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 5(b)(9) of the Reed-Bulwinkle Act, 62 Stat. 472 (1948).

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

STATEMENT OF THE CASE

This case reaches the Court upon a judgment on the pleadings pursuant to F.R. Civ. P. 12(c) and 12 (h)(2) rejecting plaintiffs' claim for damages. Accordingly, the material factual allegations of the complaints are to be taken as true and correct for purposes of deciding the legal issue upon which the dismissal of the claim was predicated. Briefly stated, those facts are as follows.

Beginning at least as early as 1966 and continuing until at least 1981, the Niagara Frontier Tariff Bureau ("NFTB"), an organization authorized by the Interstate Commerce Commission ("ICC") to engage in joint ratemaking activities under the supervision of

the Commission, and certain motor carrier members of the NFTB engaged in price fixing and coercive activities which violated their ICC approved ratemaking agreement. In addition to knowingly violating the rate bureau agreement, the defendants engaged in anticompetitive conduct including activities other than collective ratemaking. Such conduct was not approved by the ICC.[1]

The coercive conduct in which the Bureau and the individual trucking company defendants engaged prevented other trucking companies from exercising their lawful statutory right to file individual rates with the ICC. This conduct not only was not authorized by the ICC, but was beyond the power of the ICC to authorize.[2]

More specifically, executives of the NFTB and senior management officials of the defendant truckers organized a so-called "Principals Committee," the existence of which was kept secret from the ICC and from shippers. This Principals Committee engaged in price

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[1] The factual allegations of the present civil complaint for damages parallel those of a United States government antitrust action against the NFTB and the individual motor carrier defendants which was settled through the entry of a consent decree forbidding continuation of the anticompetitive conduct. *United States* v. *Niagra Frontier Tariff Bureau, Inc.*, 1984-2 CCH Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. June 26, 1984).

[2] The right of a motor tariff bureau member to make a unilateral tariff filing with the ICC frequently is referred to as the right of "independent action." This right has been guaranteed since 1948 by the Reed-Bulwinkle Act, formerly 49 U.S.C. § 5b(6) (1976), currently codified at 49 U.S.C. § 10706(b)(3)(B)(ii) and, ostensibly, by the NFTB Rate Bureau Agreement on file with the ICC. NFTB Bylaws effective June 1, 1981, Article XVII.

fixing, planned boycotts, made threats and took other actions designed to prevent competition and to increase the rates on motor freight traffic between the Province of Ontario, Canada, and the Eastern United States. Pursuant to the illegal conspiracy, the defendants filed numerous tariffs with the ICC, virtually all of which went into effect without suspension or investigation. The vast majority of the collusive tariffs received only a cursory review for obvious defects or no review at all by the ICC.[3]

These tariffs fixed prices at artificially high levels as determined through the secret and conspiratorial agreements reached in the defendants' "Principals Committee." The NFTB tariffs affect a sizable volume of motor freight traffic moving between the Province of Ontario and states in the Northeastern, Mid-Atlantic and Midwest area of the country. The international (United States-Canada) revenues for motor freight

[3] In its brief to the Court in *ICC* v. *American Trucking Ass'n.*, 104 S.Ct. 2458 (1984), the Commission explained that until 1979, it examined filings prior to their effective date for "obvious defects." By 1979, however, budget restrictions forced the Commission to reallocate its resources and the ICC determined that it could no longer maintain sufficient tariff examiners to pre-examine every filing. In October 1979, the Commission began reviewing only a random sampling of tariff filings. Currently, the Commission examines only the title pages of tariff filings. Brief for Petitioners ICC at 3 (No. 82-1643, October Term 1983).

> As a practical matter, therefore, unless a defect is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

Id. at 3. Interested parties—e.g., the shippers who have to pay the tariff charges—of course are unable to call defects to the attention of the Commission when the defects are hidden from them through conspiratorial activities.

traffic moving under tariffs filed by NFTB carriers exceeded 2.8 billion dollars between 1970 and 1980.

In addition to damages flowing directly from the collusively set rates, shippers also have been deprived of the benefit of lower rates which would have been available if motor carriers desiring to file independent tariffs had not been coerced into withholding such filings. Moreover, the availability of independently determined lower freight rates inevitably would have restrained tariff increases in joint rate filings by the Niagara Frontier Tariff Bureau's member companies.

Respondents are two shippers who were injured by paying these excessive costs for motor freight transportation between the United States and Canada. They filed antitrust actions to recover damages they sustained both on their own part and as representatives of a class of shippers injured by the defendants' actions. The defendants moved to dismiss all of these claims for damages asserting that under the precedent of *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), it is impossible for shippers to recover such damages under the antitrust laws. Agreeing with the defendants, the District Court dismissed the damage claims, and on appeal the Court of Appeals for the Second Circuit reluctantly affirmed the dismissal.[4] Judge Friendly, writing for the Court of Appeals, specifically noted that many of the arguments advanced by this Court in support of its decision in *Keogh* "do not seem

[4] The Circuit Court did remand the action to the District Court to enable plaintiffs to pursue a claim for injunctive relief to prevent further violations of the antitrust laws and to permit plaintiffs to amend their complaint in the event they had any damage claims not barred by the *Keogh* doctrine.

so compelling today" as they did in 1922. The Court of Appeals nonetheless stated that "[w]hile agreeing with appellants that much of the reasoning of *Keogh* seems outdated, we hold that its language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court." *Square D* v. *NFTB,* Appendix to the Petition for Certiorari at p. 3a.

SUMMARY OF ARGUMENT

Regulatory policy would be distorted and the public would suffer unwarranted injury if companies which receive the benefits of non-competitive pricing through antitrust immunity obtained pursuant to a regulatory plan can deliberately circumvent the regulatory framework and retain anticompetitively high profits. The Sherman Act declared a national policy of open competition in the marketplace, and exceptions to this policy pertaining to regulated industries have been and must be conditioned upon compliance with the regulatory plan. If regulated companies are able to retain excessive profits obtained through knowing circumvention of the governing regulations, then the public interest would suffer in two respects: the public will have paid too much money for products or services whose price supposedly is governed by the regulatory plan; and the credibility of the regulatory process will have been subverted.

The 1922 *Keogh* decision was a Court-generated expression of implied immunity which was necessary at that date to accommodate the national policy preventing price fixing expressed in the antitrust laws and the ICC's approval of jointly submitted transportation rates. The Court understood that Congress could

not have intended to subject the regulated carriers to damage claims for such ICC-approved rate setting.

The implied immunity recognized by the Court in *Keogh* applies, however, only when the behavior being immunized itself is in compliance with an approved regulatory plan. The fact situation presented to the Court in *Keogh* concerned rail carriers whose jointly agreed upon rates had been submitted to the ICC for review and approval. The ICC had held public hearings at which Keogh, the complaining shipper, appeared to oppose the proposed rates. Thus, the *Keogh* fact situation did not involve conspiratorial activities to subvert the regulatory process but rather it involved immunity based upon compliance with that process. There is no indication in the *Keogh* decision that the Court intended to extend the implied immunity necessitated by the Sherman Act-Interstate Commerce Act dichotomy to immunize activities designed to profit by avoidance of the Interstate Commerce Act.

The Court's statement of implied immunity in *Keogh* has been extended by some lower courts to apply antitrust immunity in all situations in which regulated entities make filings with their supervisory agency. The so-called "filed rate doctrine" is said by some courts to extend to activities which do not even involve the filing of rates but instead the suppression of rate filings. In the instant actions, for example, the *Keogh* decision is claimed to shield a range of anticompetitive conduct including the defendants' coercive suppression of other motor carriers' proposals to file independent and lower rates with the ICC. The *Keogh* protection also is asserted to apply to collective decisions not to file lower rates. Under this expansive interpretation of *Keogh,* the Congressional intent in

creating a regulated method of setting joint common carrier rates is undermined, and shippers pay excessive freight rates. The public then is deprived of the benefit it is supposed to obtain through regulated competition and the conspirators profit through avoiding the Congressional intent of the regulation. It is not likely that this reading of *Keogh* was intended by the Court, even in 1922.

The necessity for the judicially created immunity which the Court granted in *Keogh* was eliminated in 1948 by the passage of the Reed-Bulwinkle Act. Pub. L. No. 80-662, 62 Stat. 472 (formerly at 49 U.S.C. § 5b (1976)). In Section 5(b)(9) of that Act, Congress specified the circumstances under which an express statutory immunity would be available to motor carriers. Parties to an agreement approved by the ICC were relieved from the operation of the antitrust laws solely "with respect to the carrying out of such agreement *in conformity with its provisions*" and "*in conformity with the terms and conditions prescribed by the Commission.*" (Emphasis added.)

In the present action, the defendant motor carriers claim immunity (and the corresponding ability to retain illegal overcharges) notwithstanding the fact that they neither carried out their ratemaking agreement in conformity with its provisions nor complied with terms and conditions prescribed by the Commission. In short, the defendant truckers insist that Congress did not intend for them to be bound by any *quid pro quo* in which the grant of express antitrust immunity for joint ratemaking was conditioned upon compliance with the regulatory plan. This self-serving and self-enriching interpretation of *Keogh* conflicts directly with numerous post-*Keogh* decisions of this Court

which emphasize that implied immunity is disfavored, especially when Congress has granted an express immunity. Where there is express immunity, it is to be construed strictly, and unauthorized conspiratorial actions are not exempt from antitrust damage claims.

Moreover, as Judge Friendly recognized, the rationale employed when the Court grappled with the implied immunity question it faced in 1922 long since has been rejected by this Court. *See Square D* v. *NFTB,* Appendix to the Petition for Certiorari at pp. 9a-15a. Today, the defendant carriers rely on *Keogh* for the proposition that they cannot be asked to restore illegal overcharges to shippers they have cheated outside of the confines of the regulatory plan because an outdated and rejected rationale relieves them from any necessity of answering for the damages they occasioned. Any such reliance on *Keogh* has been misplaced since at least 1948, when Congress granted express immunity.

The availability of an antitrust cause of action to recover damages for conduct which has not been immunized by an agency pursuant to its regulations has been recognized by this Court in other shipping industry cases, such as *Carnation Co.* v. *Pacific Westbound Conf.,* 383 U.S. 213 (1966) and *ICC* v. *American Trucking Ass'n.,* 104 S. Ct. 2458 (1984). The continued recognition by lower courts of *Keogh*-based immunity for activities outside of the authority or ability of an agency to regulate makes no sense and contravenes the public policy expressed in the Sherman Act. Accordingly, the Court should rule that *Keogh*'s implied immunity does not extend to activities which violate a regulatory plan or to activities which are beyond the ability of the regulatory agency to approve.

ARGUMENT

I. *Keogh* Concerned Implied Immunity For *Lawful* Joint Ratemaking Activities, Not Immunity For Activities Unlawful Under The Antitrust Laws And Unauthorized By Any Regulatory Plan

Reference to the factual situation which the Court confronted in *Keogh* is a logical starting point in interpreting the extent of the immunity the Court found necessary to grant. It is axiomatic that "immunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962). Implied immunity, therefore, should be no more extensive than necessary to alleviate the problem which caused the Court to make limited suspension of the national economic policy of free competition declared in the antitrust laws.

A. *Keogh* Involved Lawful Ratemaking, Not Deliberate Frustration Of The Regulatory Plan

Keogh was a flax manufacturer who brought suit under the antitrust laws charging that a uniform rate agreement among rail carriers resulted in his paying excess rates as compared to those which prevailed prior to the collectively agreed upon tariff. As the Court noted, however, every rate of which he complained had been duly filed by the several carriers with the ICC, and "upon such filing the rates had been suspended for investigation, upon complaint of Keogh." *Keogh, supra*, 260 U.S. at 160. There were "extensive" hearings in which Keogh participated, and not until the rates had been approved by the Commission subsequent to these hearings did they become effective. Only then did Keogh file a complaint under the antitrust laws. This is a far cry from the present situation

in which the carriers (1) violated the terms of their ICC-approved bureau agreement; (2) deliberately and secretly set out to raise rates outside of the authority granted under their tariff bureau agreement, and (3) coercively prevented other carriers from exercising a statutory right to file independent tariffs.

It is doubtful that *Keogh*'s intended effect, even in 1922, was to immunize unauthorized conduct. The application of *Keogh* to unsupervised conduct was not an issue the Court had to consider when it dealt with the apparently contradictory language of the Interstate Commerce Act and the Sherman Act.

B. Implied Immunity Should Not Extend To Activities Beyond The Ability Or Authority Of A Regulatory Agency To Supervise

Immunity under the antitrust laws whether implied or express is founded on a premise that the regulatory authority is able to supervise and review the ratemaking activities of the entities which are immunized. It would be a sorry exchange indeed if the public were to give up the right to free competition and competitive prices in circumstances where the regulatory authority is unable to protect the public from exorbitant prices because it lacks the capacity to supervise the pricing activities.[8] In *Keogh*, the ICC had exercised its supervisory function and, in fact, had heard *Keogh*'s specific complaints about the tariffs in ques-

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[8] Even if a regulatory agency has sufficient resources available to prevent collusive tariffs from becoming effective, there is no reason why tortfeasors should be able to claim immunity under a regulatory plan they have violated. A rule that any claim to immunity is lost with respect to conspiratorial conduct which violates the regulatory plan protects the public interest.

tion. In the present action, the ICC was not able to supervise the collusive rates for a number of reasons. First, of course, it did not know about the collusion since the existence and activities of the "Principals Committee" were kept secret from it. Second, it was unable to review rates which the defendants *prevented* from being filed. Third, it could not approve lower rates which the conspirators jointly decided *not to file* with the ICC. Fourth, as indicated by the ICC itself, the Commission does not have the means to review the hundreds and hundreds of thousands of tariff filings it receives each year. According to the ICC Annual Report for the year 1983, the Commission received more than 1,200,000 tariff filings in that year alone. Of this total, only 188 were subjected to examination by the Commission and only 11 suspensions were ordered.

C. An Antitrust Cause Of Action For Unauthorized Conduct Complements ICC Enforcement Of The ICA

In large measure, the ICC must depend upon the carriers it regulates to comply with their rate bureau agreements and not to violate the Interstate Commerce Act. Moreover, it is contrary to the public interest to permit carriers to retain illegal profits. To the extent the antitrust laws help to prevent this result, they assist in maintaining the integrity of the ICC regulatory process.

Disadvantaged shippers are unable to obtain effective relief from the ICC when rate conspiracies are pervasive, massive, and extend over a long period of time.[6] The reason for this was pointed out in *ICC* v.

[6] The ICC regulatory plan contemplates shipper participation in an open rate-setting process. This opportunity is denied when the carriers formulate rates secretly. The ICC is victimized because the statutorily designed process by which it may receive shipper complaints is frustrated.

ATA, supra, 104 S.Ct. at 2463, n.4, where the Court noted that the ICC reviews "only a random sampling of tariff filings," and that tariffs with obvious defects inevitably are permitted to go into effect. In that case, the ICC acknowledged its inability to ensure that all carriers are in compliance with the ICA and applicable regulations. It informed the Court that it regards the availability of antitrust damage actions as an important adjunct to its supervisory authority.[7]

There certainly is no conflict between the ICC's supervisory authority over tariffs and an antitrust

[7] First, the Commission argues that without the potential for overcharge damage awards, shippers will not have sufficient incentive to report rate-bureau violations to the Commission or to file antitrust suits on their own. . . . In the Commission's view, the threshold remedies of peremptory rejection of proposed rates and suspension of rates pending investigation are inadequate to cope with substantial violations, which are typically shrouded in secrecy and undetectable on the face of a tariff proposal. . . .

ICC v. *ATA, supra,* 104 S.Ct. at 2467. The Commission was arguing for the necessity of the tariff rejection remedy to make its enforcement authority effective. Although it upheld the Commission's authority, the Court took into account the potentially large awards which conceivably could be made if the Commission exercised this potentially powerful remedy.

> Overcharge awards can easily surpass the damages for which carriers have historically been liable under § 11705(b)(3), and may even exceed the treble damages to which the carriers are vulnerable under the antitrust laws.

Ibid. It seems apparent that the Court considered that shippers injured by conspiracies occurring outside the ICC-approved conduct have a right to file damage suits under the antitrust laws.

cause of action for shippers who are damaged by unapproved conduct. In fact, the availability of an antitrust cause of action complements the ICC's regulation of the motor carrier industry. It is obvious that if the ICC can investigate only about 200 tariff filings per year, it would encounter extreme difficulty in policing a conspiracy which involves thousands of collusively filed tariffs. The possibility of an antitrust damage claim assists in preventing unauthorized conduct and in reducing the ICC's enforcement burden.

The American Trucking Association filed a brief in *ICC* v. *ATA* in which the truckers themselves made the point that the ICC's investigative powers and its authority to reject tariffs which do not comply with agency regulations do not prevent unreasonable or unlawful rates from going into effect. Brief for Respondents ATA at p. 11 (No. 82-1643, October Term 1983), *ICC* v. *ATA, supra.*[8] Tariffs become effective automatically 30 days after they are filed in accordance with 49 U.S.C. § 10762. The overwhelming majority of tariffs go into effect without any supervision by the ICC.[9] Therefore, although the ICC retains its authority as the first-line regulator of motor carrier tariffs, the availability of an antitrust remedy to shippers is of vital assistance to the proper functioning of

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[8] [T]he ICC's rejection and investigation powers do not prevent rates that may be unreasonable or otherwise unlawful from becoming effective if they are filed in accordance with 49 U.S.C. § 10762. . . .

Id. at 11. The ATA's brief was filed on behalf of the ATA and the NFTB, the defendant herein.

[9] Since the Niagara Frontier defendants' activities constituted a secret conspiracy, there was, of course, no opportunity for shippers even to ask for an investigation during the 30-day notice period before the rate automatically becomes effective.

the ICC's regulatory plan. Denial of an antitrust remedy would leave shippers at the mercy of a regulatory plan which is vulnerable to deliberate circumvention.

Yet another limitation on the availability of remedies which in theory may be available under the Interstate Commerce Act is the Act's two-year statute of limitations for shippers to assert reparations claims. Not only is this period inadequate for shippers to act upon suppressed illegal activities, but, to the plaintiff shippers' knowledge, there has been no determination that the doctrine of fraudulent concealment tolls the Interstate Commerce Act's two-year limitation clause. Thus, shippers may lack any remedy at all at the ICC for damages in instances of long-term conspiracies.

Lastly, although the Court's *ICC* v. *ATA* decision acknowledged the authority of the Commission to cancel retroactively tariffs currently in effect, the decision did not discuss whether *expired* tariffs may be cancelled. If the Commission has no authority to cancel tariffs once they have expired, then the sole means of recovery for overcharges attributable to these tariffs will be through prosecution of an antitrust damage action.[10]

For all of these reasons, the only realistic method of recovering illegal overcharges available to shippers is through an action under the antitrust laws. The ability to maintain such suits complements the ICC's own enforcement efforts and restrains carriers from the temptation to circumvent the Commission's policies.

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[10] Even assuming that the ICC may have authority to seek retroactive recission of expired tariffs, it may have scant inclination to do so.

II. The Limited Express Antitrust Immunity Granted By Congress In The Reed-Bulwinkle Act Supplanted The Implied Immunity Which Necessitated The Court's *Keogh* Decision

In 1948, Congress amended the Interstate Commerce Act by passing the Reed-Bulwinkle Act, Section 5(b)(9) of which resolved the prior disparity between the Sherman Act's anti-price fixing provision and the Interstate Commerce Act's contemplation of ICC-regulated joint ratemaking. In unambiguous terms, Section 5(b)(9) relieved parties to agreements approved by the Commission from the operation of the antitrust laws *only* "with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

The immunity granted under Reed-Bulwinkle is both comprehensive in affording carriers an opportunity to engage in lawful joint ratemaking and express in spelling out the conditions under which such lawful ratemaking may occur. The immunity granted by Congress is limited to the "making" and the "carrying out" of the rate bureau agreement. The immunity does not extend to collusive activities which are not contemplated by the agreement or necessary to its implementation. Further, in order to secure antitrust immunity, the parties to an approved agreement must carry out the agreement in conformity with its terms and in conformity with the terms and conditions prescribed by the Commission. The conduct challenged herein violated both of these provisos.

The principle that compliance with the regulatory plan is a *quid pro quo* for immunity is reinforced when the anticompetitive conduct is actually forbidden

by the regulatory plan. There can be no reason for granting an implied immunity from the antitrust laws for activity which Congress has outlawed with specificity. Section 5(b)(9) of Reed-Bulwinkle limited the express immunity provision to items which themselves were not prohibited by paragraphs 4, 5 or 6 of the Act. Section 5(b)(6) of the Reed-Bulwinkle Act explicitly provides that motor carriers shall have the right to file independently determined tariffs without interference by a rate bureau or by rate bureau members.[11] Carriers belonging to a rate bureau are prohibited from attempting to dissuade (let alone coerce) another carrier from filing an independent action with the ICC. There cannot be an implied immunity for conduct which is forbidden under the Interstate Commerce Act.

This Court repeatedly has held that immunity from the antitrust laws represents a limited exception to the overriding economic policies incorporated in the Sherman Act. In *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939), Chief Justice Hughes affirmed that "the Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce" and he went on to distinguish limited exceptions to that policy which occurred under certain regulatory programs. In *Borden*, the regulatory program was the Agricultural Act, and the Court noted that the Agricultural Act (like the Reed-Bulwinkle Act) is a limited

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[11] Section 5(b)(6) states:

> The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

statute which applies to designated transactions which are to be regulated in a prescribed manner.

> The Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable. . . .
>
> These explicit provisions requiring official participation and authorization show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

Id. at 200 and 201.

As discussed above, the implied immunity to the antitrust laws under *Keogh* was needed because prior to the passage of the Reed-Bulwinkle Act, it fell to the Court to accommodate different policy considerations in the Sherman Act and the Interstate Commerce Act. The Court since has stated, however, that any immunity occasioned by the need to accommodate otherwise inconsistent statutes is itself to be narrowly construed. Even in cases of plain statutory repugnancy, antitrust immunity is recognized only "'if necessary to make the [statutory scheme] work and *even then only to the minimum extent necessary.*'" (Emphasis added.) *Gorden* v. *New York Stock Exchange,* 422 U.S. 659, 683 (1975), quoting *Silver* v. *New York Stock Exchange,* 373 U.S. 344, 357 (1963). Moreover, the Court has characterized any implied exemption—such as the *Keogh* doctrine—as "strongly disfavored." *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51 (1963); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372 (1973); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975).

The rule that creation of an express immunity, as in Reed-Bulwinkle, supplants any implied immunity was reiterated in *Carnation, supra,* 383 U.S. 213. There the Court noted that the Shipping Act contained an explicit provision exempting designated activities from Sherman Act prohibitions. As in the instant case, the express exemption covered approved agreements, lawful under the regulatory statute, but had no application to the implementation of unapproved agreements. The Court held that:

> We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, e.g., *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 10 L ed 2d 915, 83 S Ct 1715.

Id. at 218.

This holding has been applied with consistency. Express exemptions to the antitrust laws are to be strictly construed, and implied exemptions will not be recognized unless there is a repugnancy between a regulatory scheme and the national antitrust policy which requires recognition of an exemption to avoid defeating the regulatory program. Even where an implied exemption is necessary, it will be recognized only to the

minimum extent required to permit the regulatory plan to operate.

Applying this well-established rule to the Interstate Commerce Act, the need for an implied immunity has not existed since the passage in 1948 of an amendment granting express immunity and outlining the terms and conditions on which that immunity will be available.[12] Today, in contrast to the situation which prevailed at the time *Keogh* was decided, no implied immunity is necessary in order for the regulatory plan to function in the manner intended by Congress.[13]

The regulatory agency itself has disclaimed any repugnancy in the applicability of the antitrust law to unauthorized conduct. Thus, the need for *Keogh* vanishes and the express immunity provided by Congress is the only immunity available. For carriers behaving in a lawful manner, this immunity is more than adequate.

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[12] Those terms hardly can be described as onerous. Motor carriers may obtain approval for rate bureau agreements covering hundreds of members, which agreements enable them to file literally thousands of joint tariffs covering the transport of products over multi-state areas. The motor carrier defendants herein are not victims of some good faith administrative oversight on their part which was not intended to and did not impose any harm on shippers. The conduct for which immunity is claimed consists of a deliberate scheme to thwart the ICC regulatory plan and to take advantage of a filed rate bureau agreement so as to extract significant unjustified revenues from shippers who had no knowledge of the conspiracy.

[13] In a word, the defendant truckers' position is that even though they deliberately violated the statute under which they had an express immunity available to them, the Court should grant them an implied immunity which will enable them to retain profits flowing from the violation.

III. The Legislative History Of Reed-Bulwinkle Indicates That Congress Intended To Grant Antitrust Immunity Only For Conduct Supervised And Approved By The ICC

The legislative history of the Reed-Bulwinkle Act supports the view that anticompetitive conduct hidden from the eyes of the ICC never was intended by Congress to be exempt from the antitrust laws.[14] First, as noted, the language of Section 5(b)(9) of the Reed-Bulwinkle Act clearly states that immunity is granted *only* with respect to agreements which conform to ICC-approved provisions and which conform with conditions prescribed by the Commission. Since the plain words of the statute are unambiguous with respect to the immunity being granted and the limitations on that immunity, the prevailing rule that the language of the statute will govern without necessity of further reference to the legislative history should apply. *Fairport, P.&E. R. Co.* v. *Meredith,* 292 U.S. 589, 594 (1934). Nonetheless, the legislative history buttresses the conclusion that in passing this legislation Congress intended to define the extent of antitrust immunity available to carriers and the conditions with which they had to comply to obtain and maintain that immunity.

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[14] The Court of Appeals appears to have agreed that enactment of an express exemption overcomes the need for continuing any disfavored implied exemption which was necessary to enable the regulatory statute to achieve its intended purpose. Nonetheless, the Circuit Court, in what it considered to be a case of first impression (*Square D* v. *NFTB,* Appendix to the Petition for Certiorari at p. 19A), came to what petitioners believe is an incorrect reading of Reed-Bulwinkle's legislative history and the superceding of necessity for *Keogh* immunity.

A. Only Activities Supervised By The ICC Were Intended To Be Exempt

Although Congress' intent to grant only limited immunity is easily discernible from the language of the statute and from the House and Senate reports relating to the bill, the overall legislative history of the Act dealt only indirectly with the corresponding elimination of the need for the implied immunity. The references cited by Judge Friendly in the appeals court opinion do not deal with the question of implied immunity *after* passage of Reed-Bulwinkle. In 1948, Congress was concerned with creating an exemption with defined limits and had no need to dwell on the no longer necessary *Keogh* immunity.

Considerations involving the extent of *Keogh* immunity may have been a force in causing Congress to create an express exemption, but they did not require a full-dress legislative burial of the now unnecessary implied immunity. Fairly read, the very limited discussions of *Keogh* during consideration of the Act merely are in the nature of historical references which explain that implied immunity had been necessary to accommodate competing policies and why an express immunity statute was desirable. Indeed, House Report No. 1100 which accompanied the legislation does not even mention *Keogh*.[18] There is nothing in the legislative history to show a Congressional desire to retain

[18] H.R. Rep. No. 1100, 80th Cong. 2d Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News, 1844. The language of the final report is largely identical to H.R. Rep. No. 1212, 79th Cong. 1st Sess. (1945), which accompanied H.R. 2536, a bill which passed the House but did not gain passage by the Senate during the 79th Congress.

an implied immunity greater than the express immunity being granted in the Act.

According to the House Report, legislation addressing the conflict between the antitrust laws and the Interstate Commerce Act's contemplation of joint ratemaking activities was necessitated because, in the early 1940's, the Department of Justice, through court actions and in position statements, had begun to question the legality of the cooperative activities engaged in by carriers through their rate associations. The Report states:

> The problem involved is one of reconciling and harmonizing two great principles of public policy which have been declared by Congress.

H.R. Rep. No. 1100, *supra,* 1948 U.S. Code Cong. & Ad. News at 1847. These were the antitrust laws and the transportation policy set forth in the Interstate Commerce Act. The Report continues:

> The only practical approach to the problem is to grant to a competent administrative agency, as is proposed in the bill, the authority to resolve the conflict *in specific instances of proposed joint action by carriers.* (Emphasis added.)

Id. at 1848.

This Congressional statement of purpose is important. The supervisory authority of the ICC is directed solely to *"proposed"* joint actions, and those joint actions are identified in "specific instances." Congress contemplated a grant of immunity only where the conduct to be immunized was presented to the agency in a context where the agency would have a chance to review it giving due regard to public policy consid-

erations, including competitive pricing considerations. There was no intent to immunize conduct, as presented in the pending NFTB actions, where the illegal agreements were *implemented* rather than *proposed* and where the ICC was deprived of any ability to reject the activities.

The next touchstone to the immunity issue occurs in an ambiguous passage of the Report which states:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

Id. at 1848. The troublesome question arises in the phrase applying the antitrust laws "so far as they are now applicable." The plaintiff shippers herein believe that the most logical construction of this term means that the antitrust laws apply as intended in the Sherman Act. This construction is supported by the next succeeding clause which begins *"except"* as to joint agreements approved by the Commission. If Congress had intended that the antitrust laws should not apply to any rate-related conduct, including unapproved conduct, the entire "exception" clause would have been superfluous.

Furthermore, the sentence as a whole clearly indicates that Congress intended that the ICC be able to make a judgment as to whether relief from the antitrust laws should be granted because the proponent of

the relief had convinced the Commission that such relief would further national transportation policy. The conduct at issue herein, however, was not presented to the Commission and therefore could not have met the intent that the ICC review the conduct in order for immunity to attach. Also, as noted, *supra,* Section 5 (b)(6) of the Reed-Bulwinkle Act states that the Commission "shall *not* approve" agreements which suppress the right to independent action. Since these activities were not eligible for ICC approval, they cannot be exempt from antitrust safeguards.

Thus, the entire exception clause which limits relief from the antitrust laws is contingent upon compliance with the regulatory plan. A contrary interpretation of the "now applicable" wording of the ambiguous sentence of the House Report would negate the exception clause. Congress cannot have intended to give both the express immunity granted to enable the ICC to make an informed decision that specified joint rate activity should be relieved from the operation of the antitrust laws and a blanket implied immunity.[16]

Strong additional support for the conclusion that Congress granted immunity only for authorized conduct is found in H.R. Rep. No. 1100, *supra,* 1948 U.S. Code Cong. & Ad. News at 1855:

> While the *approval* of that basic [rate bureau] agreement by the Commission *operates to relieve*

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[16] That the activity to be immunized must be specified not only is logical but is consistent with the earlier reference to permitting the agency to review "specific instances of proposed joint action by carriers." The defendants herein are arguing that they have obtained immunity for unspecified, and indeed undisclosed, anticompetitive activities.

> the parties thereto from the operation of the antitrust laws with respect to any action taken thereunder, *so long as it is taken in accordance with the agreement* and such terms and conditions as the Commission may attach to its approval, it should be noted that the application of the provisions of the Interstate Commerce Act and other laws is unaffected by the granting of relief from the antitrust laws. (Emphasis added.)

By Congress' own intent, the relief from the antitrust laws which derives from ICC approval of the basic rate agreement is limited to action "taken in accordance with the agreement." This reaffirms that conduct outside of the boundaries of the rate bureau agreement has not been granted relief from the operation of the antitrust laws or any other laws.

As noted, the *Keogh* decision itself received very little comment during the hearings and debates on the Act. The principal debators were legislators from Southern and Western states who were opposed to any exemption for joint ratemaking because they feared that collectively set rates would discriminate against their states in favor of Northern states.[17] The response

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[17] The following colloquy is typical:

> MR. SALTONSTALL. Why is it necessary, then, that this bill be passed, in view of the fact that the Interstate Commerce Commission has been acting on these cases over the period of the last 25 years?
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> MR. REED. I would say, because the rate bureaus are always faced with a threat of action by the Antitrust Division of the Department of Justice.
>
> MR. BRICKER. Mr. President, if the Senator will yield, it is not only a threat, but an actual prosecution, at the present time.

by the bill's proponents to the reservations expressed lead to the conclusion that the only antitrust immunity being granted was the immunity contained in the Act itself. During the debates, Senator Reed said:

> MR. REED. When the bill came to us it was a wide-open bill. Any agreement between carriers could be submitted to the Interstate Commerce Commission. *We say these agreements must be limited to the things which we describe.* They must be in the public interest. They must not unduly restrain competition. They must be consistent with the national transportation problem. We cannot go any further in limiting the character of the agreements which may be made and offered to the Commission for its approval or disapproval. (Emphasis added.)

93 Cong. Rec. 5, 6598 (1947).

At the Senate hearings on the bill, a colloquy had developed between a witness, Mr. Wiprud, and Senator Wheeler, the Chairman of the Committee. After the witness had called *Keogh* and *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), to the Committee's attention, Senator Wheeler responded:

> MR. REED. A threat of prosecution, I should have said, and it was started in 1942 by actual prosecution.
>
> MR. BRICKER. If the Senator will yield further, the Georgia case does not go directly in the first instance to the ratemaking power.
>
> MR. REED. No.
>
> MR. BRICKER. The Georgia case attacks the whole railroad rate system as a conspiracy against the southeastern section of the country.
>
> MR. REED. That is correct.

93 Cong. Rec. 5, 6596 (1947).

> THE CHAIRMAN. Of course, I agree with you; the law has always been if you do something in an illegal way, even though the result of it would be all right, it would still be a violation of the Sherman Antitrust Act. That is the fundamental law of the land with reference to the Sherman Antitrust Act.

Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce, 79th Cong., 2d Sess. 581 (1946) [hereinafter cited as the 1946 Senate Hearings] (testimony of Mr. Arne Wiprud, attorney).

During the same hearing, another witness, Mr. Winn, testified:

> When they were found to be in furtherance of a national transportation policy and to meet such standards and conditions as the Commission imposes, the Commission would be authorized to approve them. Approval is further conditioned on preserving reasonable opportunity for independent action by individual carrier. *To the extent that these arrangements were approved by the Commission—and only to that extent—carriers could be relieved from the restrictions of the Sherman Act.* (Emphasis added.)

1946 Senate Hearings, *supra,* at 366 (testimony of Mr. Sam Winn, Chairman, Western Conference Committee). It could not be more explicitly stated that only to the extent that the carriers' activities conformed to ICC-approved arrangements where they were to be relieved from they restrictions of the Sherman Act.

Finally, an example posed by the bill's sponsor, Senator Reed, during the 1947 hearings is instructive:

> SENATOR REED. Suppose the railroad executives should meet and determine that they should buy

> all of the steel to make their steel cheaper, and they submitted that agreement to the ICC. The ICC has no jurisdiction over steel mills, purchase of steel mills, other than its indirect influence in the way of authorizing capitalization. It would have no jurisdiction, and if the Commission did issue an approval, it would have no force or effect. That would be a direct violation of the antitrust laws or at least subject to action under the antitrust laws.
>
> I have used a violent example here, but it is the one that most readily occurs to me.

Hearings on S. 110 Before the Senate Comm. on Interstate Commerce, 80th Cong., 1st Sess. 146 (1947). As previously discussed, however, the ICC could not have approved the activities which were the subject of the present complaints. It is statutorily forbidden to permit carriers to suppress another carrier's independent rate actions. It cannot approve secretly set rates which do not comply with the Commission's prescribed notice and review requirements. Senator Reed had no hesitation in declaring that activities of this nature would be a direct violation of the antitrust laws and remain subject to action under them.

In sum, while direct references to *Keogh* are sparse and do not address directly its supplanted status, the reports, the hearings, and the debates confirm a Congressional intent that the antitrust laws shall apply to activities outside of the exemption being granted.

B. The Motor Carrier Reform Act Of 1980 Also Indicates That Congress Intended Reed-Bulwinkle To Grant Only An Express Immunity

The Motor Carrier Reform Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793 (1980), strengthens

the view that subsequent to the passage of Reed-Bulwinkle, the need for the implied immunity and the implied immunity itself both were displaced by the express antitrust exemption granted by Congress. The 1980 Report on S. 2245 by the Senate Committee on Commerce, Science, and Transportation described the situation on that date as follows:

> Under the current law [i.e., Reed-Bulwinkle] the motor carrier industry enjoys a privilege that is not accorded to other sectors of the economy. *As a result of an amendment to the Interstate Commerce Act passed in 1948,* the so-called Reed-Bulwinkle Act, the motor carrier industry has been granted immunity from the antitrust laws by the ICC in order to meet together to set uniform prices for transportation services for all competitors. (Emphasis added.)

S. Rep. No. 96-641, 96th Cong. 2d Sess. (1980), at 12. It seems clear that Congress views Reed-Bulwinkle as having granted an express exemption to the antitrust law which had the effect of displacing any prior implied immunity. As Justice Stevens put it in a recent opinion:

> Congress reacted to the *Pennsylvania Railroad* decision much as it reacted to the *South-Eastern Underwriters* decision. It decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate that policy choice.

Southern Motor Carriers Rate Conference, Inc. v. *United States,* 105 S.Ct. 1721, 1734 (1985).

Congress' 1980 statement that motor carriers obtained their existing immunity "as a result" of the

Reed-Bulwinkle legislation gives no indication of an immunity existing outside of the confines of Reed-Bulwinkle or an immunity for anticompetitive activities which the ICC has not authorized. The focus is on the fact that motor carriers enjoy a special privilege through the express immunity granted in Reed-Bulwinkle. Accordingly, there is no need for any further implicit exemption.[18]

C. This Court's Parallel Case Law Recognizes That Congress Intends Express Immunity In The Transportation Industry To Displace Previous Implied Immunity

The Court's analysis of Congressional intent articulated in *Carnation Co., supra,* 383 U.S. 213, reinforces the conclusion that in granting the express immunity of Reed-Bulwinkle, Congress necessarily was delineating the boundaries of the immunity to be granted. In *Carnation,* a unanimous Court ruled that an antitrust damage remedy exists for joint ratemaking activities which are conducted outside of the boundaries of a regulatory statute granting antitrust relief for approved agreements.[19] The Court held that:

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[18] This would appear to be the view of all three branches of the government: "[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions," *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 787. The Executive branch already has expressed its disagreement with the defendants' claim to an implied exemption.

[19] The defendant carriers argue that there are differences between the Shipping Act and the Interstate Commerce Act which justify making unapproved price fixing actionable under one statute and not under the other. Not only does the reasoning of this Court in *Carnation* apply with full force to the present unauthorized conduct, but it is clear that Congress viewed the two Acts as conferring

> The creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.

Id. at 216-217. The Court referred to its long-time recognition that the antitrust laws represent a "fundamental national economic policy" and stated:

> We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts.

Id. at 218.[20] This ruling should apply with the same force in the motor carrier transportation industry as in the ocean shipping industry.

The conclusion that *Keogh* was supplanted ever since an express immunity was made available by Congress receives further support in *ICC* v. *ATA, supra,* 104 S.Ct. 2458. While affirming the authority of the ICC

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the same limited exemption. House Report No. 1100 accompanying Reed-Bulwinkle specifically cites Section 15 of the Shipping Act as a direct precedent for granting an administrative agency authority to approve agreements between carriers which confers antitrust law relief. H.R. Rep. No. 1100, *supra,* 1948 U.S. Code Cong. & Ad. News at 1848 and 1849.

[20] Again, with reference to legislative history, the Court should contrast the importance it has ascribed to the Sherman Act as a "fundamental national economic policy" with Congress' reference in the final report on Reed-Bulwinkle characterizing the Act as applying to the "relatively limited field of transportation in interstate commerce" by ICC-regulated carriers. House Report No. 1100 at p. 1847.

to invalidate tariffs, albeit in a divided decision, the Court unanimously referred to the right of shippers by motor carrier to collect damages for antitrust law transgressions. By contrast, throughout these proceedings, the defendant truckers have insisted that *Keogh* states a "filed rate doctrine" which immunizes *all* activities encompassed within plaintiffs' complaint irrespective of whether they represent (1) ratemaking inconsistent with their approved ratemaking agreement, or (2) agreements not to file lower rates, or (3) activities to suppress offers of competitive rates through the filing of single carrier tariffs. If the truckers are correct in their interpretation of *Keogh,* then the Court was incorrect in *ICC* v. *ATA* at 2462 where it referred to the ability of carriers to collect compensatory damages under the antitrust laws.

IV. In Subsequent Decisions The Court Has Rejected Or Discarded The Principal Points Of The Rationale It Used In Formulating The *Keogh* Result

Not only has the express immunity provided in Reed-Bulwinkle displaced the need for the implied immunity granted by the Court in *Keogh,* but the Court subsequently has discarded much if not all of the reasoning it employed in *Keogh.* The Court of Appeals identified four key elements which the Court relied on to support the result it reached. They are (1) that since the rate published under a tariff is the "legal" rate between the carrier and the shipper, a damage award could be construed as a discriminatory rebate; (2) that a calculation of damages based on rates which would have prevailed but for the conspiracy would involve speculation and difficulties of proof; (3) that shippers may not have suffered injury if they passed on the illegal

overcharges to their customers; and (4) that the "legal" rate which carriers must charge is the rate on file with the ICC. After analyzing these four underpinnings of *Keogh*'s implied immunity doctrine, the Court of Appeals concluded that none are valid today.

A. The Possibility That Damage Awards Would Be Equivalent To A Rebate Is Inconsistent With Subsequent Holdings Of The Court And In Any Event Would Not Apply In A Class Action Recovery Suit

Damage awards are not rebates. The Court of Appeals discussed the difference between a secret rebate—a carrier's passing money under the table to a favored shipper—and damages awarded pursuant to a judicial decision that a shipper has suffered antitrust injury. The opinion reiterated this Court's observation in *Carnation, supra,* 383 U.S. at 219, n.3:

> There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.

The Court of Appeals observed that refusal to grant damages to injured shippers for fear that the awards would be discriminatory would be inconsistent with the Court's decision in *ICC* v. *ATA, supra.* In that case the Court commented that when the ICC finds an effective tariff unlawful, injured parties can recover damages under Section 11705(b)(3) *and* whatever additional amounts the antitrust laws allow.[21]

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[21] For a variety of reasons, the only overcharge recovery which shippers are likely to obtain in broad conspiracies such as the one now before the Court are those flowing from an antitrust damage action. First, the ICC which through budgetary restraints is struggling to review even a tiny fraction of the tariff filings it receives would find it difficult or impossible to adjudicate the validity of the numerous tariffs which are filed in connection with a regional or national conspiracy. Second, statute of limitations problems (see Section I, *supra*) may serve to prevent recovery. Third, only the possibility of classwide relief is likely to justify the expense of seeking recovery. Thus, while the plaintiffs in antitrust damage actions almost never receive treble damages to which there is theoretical entitlement, they stand a chance of recovering at least actual damages through instigation of an antitrust damage suit.

The Court of Appeals also correctly recognized that any concern about discriminatory rebates is "scarcely applicable" to suits seeking recovery of overcharges on behalf of a class of injured shippers.[22]

Perhaps most importantly, a tortfeasor's argument that it should not be asked to make restitution to its victims who actively seek compensation because this would be unfair to unrecompensed victims should be rejected as senseless. The justification for this contention depends upon the presumption that the wrongdoing affected so many shippers and so many tariffs as to require that illegal profits be left in the hands of the wrongdoer because of alleged complexities in the compensation process.

B. Determining Damages Presents No Extraordinary Problem

Determination of damages will depend upon proving the lower rates which would have prevailed absent the conspiracy. The contention that such rates may be difficult to ascertain was characterized by Judge Friendly

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[22] The same observation was made by Judge Marshall in the *Wheat Rail Freight Antitrust Litigation,* 579 F. Supp. 517, 535 (N.D. Ill. 1984).

as "even less compelling" today than the claim that a damage award would be tantamount to a freight preference.

Proof of what the rates would have been absent the illegal conspiracy can be established by probability, and there need not be direct, positive evidence. "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931).

Motor freight rates are not so complex or unique that courts should refrain from calculating damages occasioned by the unauthorized price fixing of carriers. Any view that ICC expertise is essential to the determination of damages is undercut by reference to actual ICC procedures. *The vast majority of motor freight tariffs in fact become effective with no review whatsoever by the ICC.*[23]

In the MCA of 1980, *supra*, and the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), Congress itself endorsed the view that rates filed by carriers in open competition would be a fair measure of what trucking rates should be in a competitive market.[24] This statu-

[23] See section I C, *supra*.

[24] While it is premature to suggest the damage method which the plaintiff shippers will select for the Niagara Frontier violations, two ready reference points come to mind. Agreements reached at the secret Principals Committee to raise tariffs by a set percentage, such as five percent, provide an easy method of computation. Likewise, comparison between prices in the independent tariff filings which the defendants suppressed versus the prices which were maintained as a result of the suppression gives a readily understood measure of damages.

Defendants should be estopped from contending that had they not illegally raised prices or illegally suppressed independent tariff filings, they might nonetheless have been able to obtain higher tariffs through following approved procedures. Wrongdoers should not be given the benefit of speculation that their acts which were deliberately intended to enhance prices would have been ineffective to do so.

tory determination that there is little need for regulation over independent pricing practices in the trucking industry followed an extensive study by the Congress, and clearly refutes the assumption prevailing in 1922 that the only legal or reasonable rate was that which was approved by the ICC after a complicated review process.[25]

In fact, the award of damages for antitrust violations in regulated industries has become commonplace. *Carnation, supra*, 383 U.S. 213; *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984); *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. 773. Some of these cases involved tariffs or

[25] Even under the original Interstate Commerce Act of 1887, independent tariffs could be filed and become effective without ICC review. Interstate Commerce Act, Chap. 104, 24 Stat. 379 (1887).

pricing agreements affecting competitors rather than customers, but the damage calculations involved the selfsame issue of determining what prices would have prevailed in the absence of the conspiracy.

C. *Keogh*'s Justification That Shippers Could Not Prove Damages Because Transportation Charges Are Passed On To Customers Of The Shippers Has Been Rejected

It is not necessary to linger upon the concern in 1922 that shippers should not recover antitrust damages for illegal overcharges because they *might* have passed these damages on to their customers. This "pass on" defense effectively was eliminated by this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977) which held that the antitrust damages claim rests with the person paying the overcharge. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 491, n.8 (1968) in which the Court dismissed the *Keogh* decision's damages argument as "dictum."

D. Rates Conspiratorially Set In Contravention Of ICC Regulations Necessarily Are Illegal

In *Keogh,* the Court suggested that rates resulting from a conspiracy may not necessarily be illegal because the legality of rates is determined under provisions of the Interstate Commerce Act. It may be that at this point in the Court's analysis it was focusing on the necessity for implied immunity and that it was with reference to the ability of the ICC to approve joint rates that it characterized collectively set rates as not necessarily illegal. The better policy is that rates set in secret defiance of a regulatory plan should be

regarded as illegal. There is little purpose in giving a regulated entity which has set out to abuse its regulated status an opportunity to invoke the protection of that status once its illegal activities come to light.

Furthermore, the Court's suggestion in *Keogh* that conspiratorial conduct is not necessarily illegal is plainly inconsistent with the recognition that even prior to the passage of Reed-Bulwinkle such conduct could be enjoined either by the Department of Justice or a private party precisely because the conduct is unlawful under the Sherman Act.

The argument that even though carriers engaged in unlawful conduct in submitting a rate to the Commission for approval, the rate cannot be used for comparison purposes in computing damages has been rejected by the Court. In *Canter* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), the defendant utility, which had been sued for damages under the antitrust laws, raised a contention that it was obliged to conform to approved tariffs even if these tariffs were implemented through conduct which violated the Sherman Act. The Court, however, distinguished conduct compelled by a regulatory agency without solicitation by its regulated entities, and application by such companies for approval of tariff proposals which they formulated for their own benefit.

> We may assume, *arguendo,* that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command. Such an assumption would not decide this case, if, indeed, it would decide any actual case. For typically cases of this kind involve a blend of private and public decisionmaking. The Court has already decided that state authori-

zation, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. . . .

> The case before us also discloses a program which is the product of a decision in which both the respondent and the Commission participated. Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. . . . There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law.

Id. at 592-594.

The "legal" rates, here under attack, are rates which were the product of a forbidden conspiracy. The collusively set rates were not compelled by the ICC. Accordingly, the artificially high prices which resulted from the Commission's unwitting approval of these rates does not serve to legitimize them as competitive rates. To state it differently, the defendants' success in deceiving the Commission that their rate filings complied with the tariff bureau agreement the ICC had approved does not give them the right to retain all revenues they collected pursuant to non-complying ratemaking.

V. Since 1980 The Express Immunity Which Displaced *Keogh*'s Implied Immunity Has Been Further Limited

Petitioners' complaints allege that the defendant carriers' illegal activities continued until at least 1981. By that time, Congress had passed the Motor Carrier Reform Act of 1980, which made the express exemption to the antitrust laws granted in the Reed-Bulwinkle Act even more stringent. Although the MCA made no direct reference to *Keogh*, it is indisputable that the Act expressed Congress' aversion to anticompetitive rate setting. As the Court of Appeals noted with respect to the Congressional purpose:

> Exposing rate making to competitive forces to as great an extent as possible was among the most significant aspects of this deregulation.

Square D v. *NFTB*, Appendix to Petition for Certiorari at p. 15a (citing H.R. Rep. No. 1069, 96th Cong. 2d Sess. at 3-4 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 2283 (accompanying the MCA).

Inherent in the passage of the Act was recognition that a range of competitive rates is available and that the fact that a tariff at a high rate is on file with the ICC does not mean that other, lower and more competitive rates should not be available. If the higher rate is the product of conspiratorial non-compliance with the regulatory scheme, damages may be ascertained through comparison with rates which would have applied absent the conspiracy. The public interest in having such lower rates available—rates determined through the competitive process—was endorsed by Congress in the MCA.

The legislative history reflects this view. The legislation followed "one of the most intensive inquiries

ever conducted by the Committee on Commerce, Science, and Transportation." Senate Report No. 96-641, *supra*, at 2. The fundamental premise of the Act was a Congressional belief

> that while the marketplace is not perfect by any means, it is a better regulator of resources and services than a small group of bureaucrats in Washington, D.C.

Id. at 3. Congress was particularly critical of the rate bureau process even when that process operated in accordance with the Interstate Commerce Act and with ICC regulations.

> Over the years a system of "rate bureaus" has grown up to take advantage of this [Reed-Bulwinkle] antitrust immunity. . . .
>
> During the course of its hearings, the Committee heard a good deal of criticism of the rate bureau process. The clear advantage of the rate bureau process is that it provides a certain predictability in the rate structure and a system that shippers and truckers have learned to live with over the years. *The disadvantage is that the system inherently tends to result in rates that will be compensatory for even the least efficient motor carrier participating in the rate discussions.* When this happens, consumers lose the benefit of price competition that would occur if more efficient carriers were able to offer more attractive rates. Another serious problem has been the closed nature of the rate bureau proceedings. Voting upon specific rate proposals is done behind closed doors. In addition, many have contended that the entire process is controlled largely by rate bureau employees rather than by the carriers themselves. (Emphasis added.)

Id. at 12, 13.[38]

Finally, reverting to Justice Brandeis' concern in the *Keogh* decision that damages computations in truck or rail industry pricing conspiracies would be complex because the task of determining competitive rates involves great expertise, there is a contrary finding in the legislative history:

> The Committee has found that the evidence in the record does not support the contention of the motor carrier industry that trucking transportation is so different from all other forms of economic activity in the country that it, and it alone, should be allowed to exercise this extraordinary immunity from the antitrust laws.

Id. at 14. It is apparent that Congress believes that motor carrier rates set by truckers unimpeded by rate bureau agreements are more likely to be fair, reasonable, and economically efficient than those set through rate bureaus. This Congressional philosophy effectively overcomes the argument that damage theories based upon comparisons between independent rates and collusive rates might be flawed because they do not con-

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[38] Congress' misgivings with respect to rate bureau operation carried out in accordance with the approved rate bureau agreement surely would have been intensified with respect to illegal activities designed to go beyond the rate bureau process. If Congress was concerned about the closed nature of rate bureau proceedings and control by a limited number of bureau employees, what would have been its reaction to a secret committee of principals made up of the bureau's top management and top executives of its large member carriers?

tain an injection of the ICC expertise. In its deliberations in connection with the MCA, Congress reconfirmed that ICC intervention is not necessary to set appropriate rate levels.

CONCLUSION

Persons who abuse express exemptions to the antitrust laws are not entitled to claim the protection of an implied exemption. Recognition of an implied exemption would be inimical to the regulatory plan which has been subverted and would enable wrongdoers to retain the fruits of their illegal conduct. The Court should reverse the judgment of the Court of Appeals and hold that no implied exemption exists for conspiratorial efforts to defeat a regulatory plan.

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